



U.S. Citizenship
and Immigration
Services

FILE:

Office: CALIFORNIA SERVICE CENTER

Date: OCT 07 2004

IN RE:

Applicant:

APPLICATION:

Application for Waiver of of the Foreign Residence Requirement under Section 212(e)
of the Immigration and Nationality Act; 8 U.S.C. § 1182(e).

ON BEHALF OF APPLICANT:

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

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**identifying data deleted to
prevent clearly unwarranted
invasion of personal privacy**

DISCUSSION: The waiver application was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The record reflects that the applicant is a native of Ukraine. She is subject to the two-year foreign residence requirement under section 212(e) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1182(e), because she participated in an exchange program financed by the United States (U.S.) government for the purpose of promoting international, educational and cultural exchange, and because the Director, Waiver Review Division (WRD), U.S. State Department Visa Office has designated Ukraine as requiring the services of persons with the applicant's specialized knowledge or skill.

The record reflects that the applicant was admitted to the United States as a J1 nonimmigrant exchange visitor on September 1, 1996. Upon completion of her exchange program the applicant returned to the Ukraine for one month. She subsequently obtained an F-1 student visa and returned to the U.S. to study. In April 2001, the applicant married a U.S. citizen. The applicant was denied adjustment of status by Citizenship and Immigration Services (CIS) based on her failure to comply with J1, two-year foreign residence requirements. The applicant presently seeks a waiver of her two-year foreign residence requirement in Ukraine, based on the claim that her U.S. citizen husband would suffer exceptional hardship if he were separated from the applicant for two years.

The director determined that the applicant had established her husband would suffer exceptional hardship if he moved temporarily to the Ukraine with the applicant. However, the director concluded that the applicant had failed to establish her husband (Mr. [REDACTED]) would suffer exceptional hardship if he remained in the U.S. while the applicant fulfilled her two-year foreign residency requirement abroad. The application was denied accordingly.

On appeal, the applicant asserts that mental health and financial evidence contained in the record establishes that Mr. [REDACTED] would be unable to support or care for himself without the applicant's help, and that he would suffer exceptional emotional and financial hardship if the applicant returned to the Ukraine for two years. Section 212(e) of the Act states in pertinent part that:

(e) No person admitted under section 101(a)(15)(J) or acquiring such status after admission

(i) whose participation in the program for which he came to the United States was financed in whole or in part, directly or indirectly, by an agency of the Government of the United States or by the government of the country of his nationality or his last residence,

(ii) who at the time of admission or acquisition of status under section 101(a)(15)(J) was a national or resident of a country which the Director of the United States Information Agency pursuant to regulations prescribed by him, had designated as clearly requiring the services of persons engaged in the field of specialized knowledge or skill in which the alien was engaged, or

(iii) who came to the United States or acquired such status in order to receive graduate medical education or training, shall be eligible to apply for an immigrant visa, or for permanent residence, or for a nonimmigrant visa under section

101(a)(15)(H) or section 101(a)(15)(L) until it is established that such person has resided and been physically present in the country of his nationality or his last residence for an aggregate of a least two years following departure from the United States: Provided, That upon the favorable recommendation of the Director, pursuant to the request of an interested United States Government agency (or, in the case of an alien described in clause (iii), pursuant to the request of a State Department of Public Health, or its equivalent), or of the Commissioner of Immigration and Naturalization [now, Citizenship and Immigration Services, CIS] after he has determined that departure from the United States would impose exceptional hardship upon the alien's spouse or child (if such spouse or child is a citizen of the United States or a lawfully resident alien), or that the alien cannot return to the country of his nationality or last residence because he would be subject to persecution on account of race, religion, or political opinion, the Attorney General [now the Secretary, Homeland Security, "Secretary"] may waive the requirement of such two-year foreign residence abroad in the case of any alien whose admission to the United States is found by the Attorney General [Secretary] to be in the public interest except that in the case of a waiver requested by a State Department of Public Health, or its equivalent, or in the case of a waiver requested by an interested United States government agency on behalf of an alien described in clause (iii), the waiver shall be subject to the requirements of section 214(I): And provided further, That, except in the case of an alien described in clause (iii), the Attorney General [Secretary] may, upon the favorable recommendation of the Director, waive such two-year foreign residence requirement in any case in which the foreign country of the alien's nationality or last residence has furnished the Director a statement in writing that it has no objection to such waiver in the case of such alien.

The applicant asserts on appeal that a long history of mental illness impairs [redacted] ability to maintain employment or to live independently. In support of her assertion, the applicant submits psychological reports and employment history information for [redacted] as well as letters from friends and family, and affidavits from [redacted] and the applicant regarding [redacted] employment history and mental state.

The record contains a psychological evaluation (Evaluation) conducted on October 12, 2002, by Thomas [redacted]. In his evaluation, [redacted] concludes that the "[r]esults of the clinical interview show that Mr. [redacted] suffers from a combination of two serious mental disorders, Dysthymic Disorder and Major Depression, that have adversely affected his educational, vocational and social functioning." See Evaluation at 6. The AAO notes that [redacted] was referred to [redacted] for J1 waiver application purposes, and that [redacted] conclusions were based on a single interview of undetermined length with the applicant.

[redacted] states in his evaluation that some of the behavior described by [redacted] satisfies the criteria for Major Depression as defined in the DSM-IV. See Evaluation at 5. However, the record contains no indication that [redacted] attempted to independently verify any of the behavioral or personal history information that [redacted] described to him, and the record reflects that [redacted] was not a patient of Dr. [redacted] prior to or subsequent to the psychological evaluation in October 2002. [redacted] did not recommend or prescribe a treatment plan for [redacted] and the record contains no evidence to indicate that [redacted] has sought or obtained psychological treatment since his October 2002 evaluation.

The AAO notes that [REDACTED] conclusions are based on the determination that [REDACTED] account of his personal history was consistent and included significant detail to indicate that the information provided by him is reliable." See Evaluation at 7. The AAO notes, however, that on appeal the applicant attempts to clarify employment history discrepancies contained in the record by indicating that [REDACTED] was unable to correctly recall his periods of employment because his depression causes him to suffer from impaired memory and an impaired ability to think, concentrate, or make decisions. See Appeal at 7. Based on the above concerns, the AAO finds that the conclusions reached in [REDACTED] psychological evaluation are unreliable and thus have no probative value regarding [REDACTED] psychological condition or regarding the effect that a two-year separation from the applicant would have on [REDACTED]

The record additionally contains a June 2002 letter from [REDACTED] MFT verifying that he conducted six, one-hour counseling sessions with [REDACTED] between September 29, 1999 and November 2, 1999. [REDACTED] states that [REDACTED] sought treatment based on reported symptoms of depression and anxiety related to a 1996 break-up with a former girlfriend. [REDACTED] states further that [REDACTED] reported being in love with and obsessing about a woman with whom he was sharing an apartment and whom he indicated was in a relationship with another person.

The AAO notes that the above-stated purpose of [REDACTED] counseling session with [REDACTED] contrasts with information contained in the applicant's and [REDACTED] September 2002, personal statements which indicate that the applicant and [REDACTED] were in a relationship for approximately one year before the counseling sessions began, and that within the context of being in a relationship, the applicant moved in with [REDACTED] three months before he sought counseling with [REDACTED] for anxiety related to a 1996 break-up with his former girlfriend. The AAO finds that the information provided by the applicant and [REDACTED] contradicts the stated purpose of [REDACTED] counseling sessions with [REDACTED]. The reliability of any diagnosis contained in [REDACTED] report is thereby undermined and of no probative value.

The AAO finds further that the record contains no evidence to establish that [REDACTED] was or is an alcoholic. In addition, the AAO finds that [REDACTED]'s friends and family members are not mental health experts, and that the letters written by them have no probative value as to [REDACTED] mental condition or the psychological effect a two-year separation from his wife would have on [REDACTED]

In addition to the above concerns and findings, the AAO notes that the employment history information contained in the record contains discrepancies relating to the dates that the applicant has worked. Employment period information contained on the G325-A, Biographical Information Forms (Form G-325) submitted by the applicant on May 8, 2001 and on November 18, 2002 conflicts with employment period information submitted by the applicant's employers. [REDACTED] stated in an August 8, 2002 letter that Mr. [REDACTED] worked as a salesperson for [REDACTED] Printing between 1995 and November 2002. This information conflicts with information provided by the applicant stating that he worked for [REDACTED] Printing between August 1999 and May 2001. Moreover, information contained in a letter from [REDACTED] Accountancy states that [REDACTED] worked with the company in 1997 and 1998. The Form G-325s state however, that [REDACTED] worked for [REDACTED] Accountancy between May 8, 1999 and November 1999. The AAO notes that the employment history information contained in the applicant's Form G-325s indicates that [REDACTED] was unemployed between May 1996 and December 1998. The Form G-325s also indicate, however, that the applicant worked in and owned a company called [REDACTED] between May 1998 and February 2000. In addition, the AAO notes that although the applicant states on appeal that [REDACTED] was fired in late 2002, from a Mexican Consulate job he obtained in May 2002, the record

contains no evidence of [REDACTED] termination. The AAO finds that the employment period discrepancies contained in the record are material, and that applicant has therefore failed to establish when [REDACTED] has or has not worked, or that he is mentally incapable of working or supporting himself without the applicant.

In *Matter of Mansour*, 11 I&N Dec. 306 (BIA 1965), the Board of Immigration Appeals stated that, "[t]emporary separation, even though abnormal, is a problem many families face in life and, in and of itself, does not represent exceptional hardship as contemplated by section 212(e)".

In *Huck v. Attorney General of the U.S.*, 676 F. Supp. 10 (D.D.C. 1987) the U.S. District Court, District of Columbia, additionally stated that, "[c]ourts have recognized that the 'exceptional hardship' standard must be stringently construed lest the waiver exception swallow the salutary two-year residence rule Forceful application of the standard also guards against attempts by applicants to manufacture hardship in order to come within its terms." (Citations omitted).

In *Keh Tong Chen v. Attorney General of the United States*, 546 F. Supp. 1060, 1064 (D.D.C. 1982), the U.S. District Court, District of Columbia stated that:

Courts deciding [section] 212(e) cases have consistently emphasized the Congressional determination that it is detrimental to the purposes of the program and to the national interests of the countries concerned to apply a lenient policy in the adjudication of waivers including cases where marriage occurring in the United States, or the birth of a child or children, is used to support the contention that the exchange alien's departure from his country would cause personal hardship. Courts have effectuated Congressional intent by declining to find exceptional hardship unless the degree of hardship expected was greater than the anxiety, loneliness, and altered financial circumstances ordinarily anticipated from a two-year sojourn abroad." (Quotations and citations omitted).

The AAO finds that based on the evidence in the record, the applicant has failed to establish that [REDACTED] suffers from a mental condition, or that he is unable to work or care for himself, or would suffer hardship beyond the anxiety and loneliness ordinarily anticipated from a two-year separation, if the applicant returned temporarily to her country.

The applicant additionally asserts that her counseling work for an organization that provides counseling services to low-income and homeless immigrant members of the San Francisco, California area is valuable and essential to the community, and that this should be taken into account for section 212(e) waiver purposes.

Section 214(l) of the Act, 8 U.S.C. § 1184, provides, in pertinent part that:

(l)(1) In the case of a request by an interested State agency, or by an interested Federal agency, for a waiver of the 2-year foreign residence requirement under section 212(e) on behalf of an alien described in clause (iii) of such section, the Attorney General [Secretary] shall not grant such waiver unless-

(C) in the case of a request by an interested Federal agency or by an interested State agency-

(i) the alien demonstrates a bona fide offer of full-time employment, agrees to begin employment with the health facility or health care organization, which employment has been determined by the Attorney General to be in the public interest; and

(ii) the alien agrees to begin employment with the health facility or health care organization within 90 days of receiving such waiver, and agrees to continue to work for a total of not less than 3 years (unless the Attorney General determines that extenuating circumstances exist, such as closure of the facility or hardship to the alien, which would justify a lesser period of employment at such health facility or health care organization, in which case the alien must demonstrate another bona fide offer of employment at a health facility or health care organization for the remainder of such 3-year period); and

(D) in the case of a request by an interested Federal agency (other than a request by an interested Federal agency to employ the alien full-time in medical research or training) or by an interested State agency, the alien agrees to practice medicine in accordance with paragraph (2) for a total of not less than 3 years only in the geographic area or areas which are designated by the Secretary of Health and Human Services as having a shortage of health care professionals, except that, in the case of a request by the Department of Veterans Affairs, the alien shall not be required to practice medicine in a geographic area designated by the Secretary.

The record does not contain a request by an interested government agency, for a waiver of the applicant's foreign residence requirement. The applicant therefore does not qualify for a waiver of her two-year foreign residence requirement under section 212(e)(iii) of the Act.

The burden of proving eligibility for a waiver under section 212(e) of the Act rests with the applicant. *See* section 291 of the Act, 8 U.S.C. § 1361. The AAO finds that in the present case, the applicant has not met her burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.